IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 210

JAMES T. STEVENS,

Petitioner,

AGAINST

HONORABLE CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~COURT OF APPEALS~~ OF THE STATE OF NEW YORK

APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT OF THE SUPREME COURT

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the ~~New York State Court of Appeals dated February 4th, 1965 (Appendix p. 48) which order denied petitioner leave to appeal from the order of October 30th, 1964 (Appendix p. 49) by~~ the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, which order dismissed a petition seeking to review an order of the Supreme Court of the State of New York, New York County which order was dated July 30th, 1964 and summarily found the petitioner guilty of criminal contempt (Appendix pp. 13 to 24).

Opinions Below

The opinion of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York is reported in 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (Appendix pp. 25 to 26). There were no other opinions in the State courts.

After being held in contempt a third time petitioner moved for a writ of habeas corpus in the United States District Court for the Southern District of New York. The opinion of the District Court is reported in 239 F. Supp. 419 (Appendix pp. 27 to 34). An appeal was taken to the United States Court of Appeals for the Second Circuit. The opinion has not yet been officially reported (Appendix pp. 35 to 44).

Jurisdiction

The order of the Court of Appeals of the State of New York the highest tribunal in the State, was entered on February 4th, 1965. Mr. Justice Harlan signed an order dated May 5th, 1965 which extended the time to file a petition for a writ of certiorari until June 3rd, 1965.

Jurisdiction of this Court to review the order of the New York State Court of Appeals by writ of certiorari is invoked under Title 28 of the United States Code, Section 1257 (2, 3), in that petitioner was deprived of his liberty and livelihood without due process of law, in violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. In addition Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter are repugnant to the Fifth and Fourteenth Amendments to the United States Constitution in that all public em-

ployees of the State of New York or its political subdivisions who claim a privilege against self-incrimination under the Fourteenth Amendment incur the penalty of forfeiture of their employment and are disqualified from holding any other public employment for a period of five years.

Article 1, Section 6 of the New York State Constitution is contained in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 1, Constitution, pages 67 and 68 of the pocket supplement (Appendix p. 44).

Section 1123 of the New York City Charter is contained in New York City Charter and Code, Volume 1, Page 307, 1963 edition published by Williams Press, Inc., Albany, New York (Appendix p. 45).

Questions Presented for Review

1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

2. Is it a denial of a right to counsel to compel a potential defendant to appear before a grand jury without having the lawyer representing the people advise the potential defendant that he has a right to the advice of counsel?

Statement of the Case

On June 26th, 1964, the petitioner, a Lieutenant of the New York City Police Department, reported to the office of Deputy Chief Inspector McGovern. Stevens was given a subpoena to report immediately to the New York County Grand Jury and a Captain Jones was assigned to take him there (R. 12).*

Stevens was advised by an assistant district attorney that he had been called as a potential defendant and not as a witness. He was told that under the Constitution of the United States he had a right to refuse to answer any questions that might tend to incriminate him but if he desired to continue to hold his public position the New York State Constitution and New York City Charter required him to sign a limited waiver of immunity (Appendix p. 46).

The district attorney further informed Stevens that if he signed a limited waiver of immunity which required him to answer questions concerning the conduct of his public office and the grand jury indicted him that his testimony could and would be used against him (Appendix p. 15).

Stevens had completed 18 years of service and had only two years to go for retirement. Threatened with the loss of his position and pension rights and not having the advice of an attorney or being told that he had a right to counsel, Stevens signed the limited waiver of immunity (R. 13, 14).

On July 15, 1964 Stevens was subpoenaed to appear before the Third July Grand Jury where he refused to sign

* R refers to the page of the certified record of the Appellate Division of the Supreme Court, State of New York.

a new waiver of immunity and asked to withdraw the limited waiver of immunity which he had signed before the First June Grand Jury. Stevens stated that he had now been advised by counsel and that he would stand on his constitutional rights (R. 22, 23). The following day Stevens received a letter from the New York City Police Department informing him that his employment had been terminated for "having refused to waive immunity from prosecution, as required by Section 1123 of the New York City Charter" (R. 30).

On July 22, 1964 Stevens was again subpoenaed to appear before the First June Grand Jury before which he had signed a limited waiver of immunity. He refused to answer any questions on the grounds of violation of his constitutional rights. He was asked:

> "did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violations of the Penal Law of the State of New York; did you?"

Stevens refused to answer on the grounds of his federal and state constitutional rights (R. 24).

Brought before the respondent, the Honorable Charles A. Marks, a justice of the Supreme Court of New York, Stevens refused to answer the same question again relying on his constitutional rights (R. 26).

Found summarily guilty of contempt Stevens was committed to the civil jail for a period of thirty days and fined $250. A stay of sentence pending review was denied by the Presiding Justice of the Appellate Division of the Supreme Court of the State of New York.

The Appellate Division of the Supreme Court of the State of New York dismissed the petition which sought to review the adjudication of contempt (R. 3).

Leave to appeal to the New York Court of Appeals was denied by the Appellate Division and subsequently on February 4, 1965 the New York Court of Appeals denied leave to appeal (R. 91).

Before the Appellate Division of the Supreme Court of New York had rendered its decision on the first contempt, Stevens was again subpoenaed to appear before the First June Grand Jury, asked the same question, and again refused to answer for the same reasons and was again found in contempt of court and given thirty days in civil prison and a fine of $250. The same events occurred a third time but the United States District Court for the Southern District of New York released Stevens in his own recognizance on a petition for a writ of habeas corpus. The writ was denied by the District Court and an appeal was taken to the United States Court of Appeals for the Second Circuit which court affirmed the dismissal of a writ of habeas corpus by the District Court. These facts appear in the opinions of the District Court (Appendix p. 27) and the Court of Appeals (Appendix p. 35).

Stage of the Proceeding Where the Constitutional Issue Was First Raised

The Petitioner first raised the constitutional issue before a New York County grand jury and counsel raised it on oral argument before a Justice of the Supreme Court of the State of New York. The Petitioner was summarily found guilty of contempt.

An original proceeding to review the adjudication of summary contempt was brought before the Appellate Divi-

sion of the State Supreme Court. The original pleadings raised the federal constitutional issue.

The Petitioner first raised the question of the privilege against self-incrimination before the New York County grand jury on July 15, 1964 (Appendix p. 19).

> "Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury? A. I—at this time I wish to stand on my constitutional rights."

First written pleading was an original proceeding before the Appellate Division of the Supreme Court of the State of New York. Page 4 of said pleading contains the following statement:

> "On July 22, 1964, I was again subpoenaed to appear before the First June 1964 Grand Jury at which time I again refused to answer standing on my state and federal constitutional rights. I honestly and reasonable felt and believed that my testimony might disclose or tend to disclose, or might be construed as disclosing, facts or circumstances, or a link therein pointing or tending to point or to suggest criminal conduct on my part. I felt that this would put me in jeopardy and expose me to the hazards of a criminal charge in connection with the matters in issue. My refusal to testify was not only under the Fifth and Fourteenth Amendments but also based on fact that I was not advised of my rights of counsel under the Sixth and Fourteenth Amendments since I was not advised properly by the District Attorney.
>
> "Immediately after my refusal on July 22, 1964, I was taken to Supreme Court of the County of

New York before the Honorable Charles Marks and was asked the following question:

"Now I am going to ask you point blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?"

"My response was the same in which I previously and in good faith claimed my said Constitutional privilege, the Respondents refused to sustain the same, and directed me, under threat of punishment for criminal contempt, to answer the said question."

The Court in its opinion answered the question raised by saying that the Petitioner had signed a valid waiver of immunity and that the Court considered the case of *Regan* v. *New York* (349 U. S. 58), as controlling and that the Court did not reach the question as to the effect of *Malloy* v. *Hogan* (378 U. S. 1), and *Escobedo* v. *Illinois*, (378 U. S. 478), on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position.

Reasons for Issuance of the Writ

The Appellate Division of the Supreme Court of the State of New York decided a substantial question involving the United States Constitution when it upheld the finding of contempt by one who claimed his privilege against self incrimination and refused to answer a question to which an affirmative answer would incriminate him. The highest court of New York denied permission to appeal. The decision of this Court in *Malloy* v. *Hogan*, 378 U. S. 1, held that the privilege against self incrimination in the Fifth Amendment is also protected by the Fourteenth Amendment against abridgement by the States. Malloy also held that a person had the right to remain silent unless he chooses to speak and to suffer no penalty for such silence. The New York State Constitution imposed the penalty of loss of public employment on petitioner for refusing to sign a waiver of immunity. The New York State Constitution in this respect is repugnant to the United States Constitution.

Petitioner was not advised that he had a right to counsel when he was compelled to appear before a grand jury even though he was called as a potential defendant. Dictum in *Escobedo* v. *Illinois*, 378 U. S. 478, indicates that under these circumstances petitioner was entitled to be advised of his right to counsel.

1. *The waiver signed by petitioner is invalid because it was obtained by coercion and was not a free and voluntary act.*

Under Article 1, Section 6 of the New York State Constitution all public employees of the State and its political subdivisions enjoy second class status if they claim their privilege against self incrimination. Failure to sign a limited waiver of immunity results in the imposition of a

penalty for claiming a Constitutional right. The employee loses his position, pension rights and the right to work in public employment for the next five years.

Stevens when called before the grand jury signed a waiver of immunity rather than lose his position after eighteen years of service with only two or more years to go in order to retire on a pension.

Prior to 1938 public employees in New York State were first class citizens under the State Constitution in that they were free to claim their privilege against self incrimination the same as private citizens in the State and the same as all citizens in a Federal proceeding.

At the New York State Constitutional Convention of 1938 the Constitution was amended to provide that any public employee who claimed his privilege would lose his job. This change in the Constitution was held valid by the highest court of New York in the case of *Canteline* v. *McClellan*, 282 N. Y. 166 (1940). At page 170 the Court stated:

> "The people of the State may write such provisions into their Constitution as they see fit, without let or hinderance, subject only to the applicable portions of the Constitution of the United States. As to immunity from self-incrimination, there is no such applicable provision and such grant could have been omitted in its entirety from the present Constitution of our state. (*Twining* v. *State of New Jersey*, 211 U. S. 78)."

This was good law until *Twining* v. *New Jersey* was overruled by *Malloy* v. *Hogan*, 378 U. S. 1. This was also good law when this Court decided *Regan* v. *New York*, 349 U. S. 58, which case has been relied on by each of the three courts which have written opinions in this matter.

It is submitted that a reconsideration of *Regan* v. *New York* in light of *Malloy* v. *Hogan*, will result in *Regan* being overruled.

The dissenting opinion in *Regan* by Mr. Justice Black and concurred in by Mr. Justice Douglas is premised on the contention that the privilege against self-incrimination applies to the States through the Fourteenth Amendment. Since this is now the law *Regan* v. *New York* should be overruled so that public employees will know that Constitutional protection does extend to them. This would be in accord with previous holdings by this Court in *Wieman* v. *Updegraff*, 344 U. S. 183; *Ullman* v. *United States*, 350 U. S. 422; *Slochower* v. *Board of Education*, 350 U. S. 551; *Torasco* v. *Watkins*, 367 U. S. 488. In *Orloff* v. *Willoughy*, 345 U. S. 83, 91, the Court stated:

> "It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertions by communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so."

In *Steinberg* v. *United States*, 163 F. Supp. 590 (1958) the Court of Claims declared unconstitutional a statute which required a retired government employee to testify before a federal grand jury involving his previous government employment or forfeit his retirement annunity. No appeal was taken but this decision was approved by this Court in *Sherbert* v. *Vernier*, 374 U. S. 398, 404 (1962).

If Stevens has a Constitutional privilege against self-incrimination then his waiver was wrongfully obtained. However Stevens should not have to take the risk of testifying in advance of a decision of this Court as to the

validity of the waiver. To require otherwise would deny Stevens the practical protection of the Constitution and only give him a Constitutional right in theory.

2. *Petitioner was denied his Constitutional right to counsel.*

Stevens appeared before the Grand Jury as a compelled witness and as a probable defendant. The investigation had already focused on him. He was confronted by a lawyer representing the people. It is submitted that under these circumstances Stevens should have been advised by the lawyer representing the people that he was entitled to counsel. *Escobedo* v. *Illinois*, 378 U. S. 478.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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GERARD E. MOLONY,
Of Counsel.

APPENDIX

Mandate of Order Adjudging Witness Guilty of Contempt

At a term of the Supreme Court in and for the County of New York; Part 30, thereof, June 1964 Term, at Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 30 day of July, 1964.

Present:

Honorable Charles A. Marks,
Justice.

The People of The State of New York

AGAINST

James T. Stevens, a witness before the First June, 1964 Grand Jury of the County of New York.

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the County of New York, and now actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, heretofore duly appointed and sworn, and it appearing to the satisfaction of the court that James T. Stevens, on July 22, 1964, after being duly summoned and sworn in the

manner prescribed by law as a witness, in a certain matter pending before such Grand Jury whereof they had cognizance, against John Doe et al, for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there refuse to answer legal, proper and relevant questions which were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

> JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:
>
> *By Mr. Andreoli*:
>
> Q. What is your full name? A. With the rank?
>
> Q. Yes. A. Lieutenant James T. Stevens.
>
> Q. And where are you assigned? A. 11th Division, Brooklyn.
>
> Q. And you are a police officer of New York City Police Department? A. I am. I am.
>
> Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that? A. I do.
>
> Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that? A. I do.
>
> Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that? A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that? A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that? A. I do.

Q. Are you prepared to sign a waiver of immunity? A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engets E-n-g-e-t-s, Avenue Brooklyn? A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engets Avenue, Brooklyn—" There appears to be a signature, "James T. Stevens," is that the—you signature? A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you? A. I did, sir.

Q. And you understand the import of it? A. I do.

Q. And was this signed in the presence of a notary? A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that? A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it? A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand jury on July 1st with that questionnaire completed; do you understand that? A. Yes, sir.

Q. All right.

Mr Andreoli: No further questions.
Any questions?
The Foreman: Should it be marked?
Mr. Andreoli: It is marked.
Thank you.

(Witness excused.)

Thereafter on July 15, 1964 James T. Stevens appeared before Third of the July 1964 Grand Jury of the County of New York and the following took place:

JAMES STEVENS, Lieutenant, New York City Police Department, appeared as a witness, but was not sworn, stated as follows:

By Mr. Scotti:

Q. Is your name James Stevens? A. That's correct, sir.

Q. Sit down, please. What is your rank? A. Lieutenant.

Q. Where are you assigned? A. Presently?

Q. Yes. A. 11th Division.

Q. And previously? A. Manhattan North.

Q. Now, Lieutenant, you appeared before the First June 1964 Grand Jury not too long ago, correct? A. That's correct.

Q. And you signed a waiver of immunity before that grand jury; is that correct? A. To my understanding it was a partial waiver.

Q. A limited waiver of immunity? A. Limited, that's correct.

Q. We explained it to you at that time? A. That's correct, yes.

Q. Now, it becomes necessary for this grand jury to examine you before them in connection with the investigation that's being conducted before this grand jury to determine whether there has been in existence a conspiracy to commit the crimes of bribery of a public officer in connection with the enforcement of the gambling laws of the State of New York.

Are you willing to sign this waiver of immunity known as a limited waiver of immunity, which means that you waive immunity with respect to matters

that are related to your official conduct or to the performance of your official duties? A. I am not.

Q. You refuse to do so? A. I refuse to do so.

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official duties, you understand that? A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination? A. Right, sir.

Q. That you can invoke at any time? A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer? A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter? A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that? A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and upon his advice, he advised me to withdraw my partial waiver of immunity.

Q. You mean your limited waiver of immunity? A. Partial or limited, yes, sir, whichever.

Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury? A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions? A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify? A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that? A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the constitution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right? A. I do. I've been advised by my counsel now.

Q. You refuse to do so? A. I do so, yes.

Mr. Scotti: You're excused.

Witness: Thank you.

(Witness excused.)

On July 22, 1964 the said James T. Stevens again appeared before the said First of the June, 1964 Grand

Jury of the County of New York and the following took place:

JAMES STEVENS, recalled as a witness, having been previously duly sworn, further testified as follows:

By Mr. Scotti:

Q. Your name is James T. Stevens? A. That's correct, sir.

Q. Now, you appeared before this grand jury on June 26th of this year, you were sworn and you signed what has been characterized as a limited waiver of immunity which was explained to you at the time; am I correct? A. At this time I refuse to answer on my State and Federal—my constitutional rights.

Q. Well, if you recall, Mr. Stevens, Mr. Andreoli put to you a number of questions before you were sworn advising you that you were being called as a potential defendant and not as a witness, and finally asking you, after explaining the nature of the waiver of immunity, whether you were willing to sign this waiver of immunity, and you did sign this waiver of immunity; am I correct? A. I refuse to answer on the grounds of violation of my constitutional rights.

Q. Well, on that occasion you were directed by the grand jury to fill out a financial questionnaire and return it to this grand jury filled out; am I correct? A. I refuse to answer on the constitutional rights.

Q. I explained to you last time when you appeared with your attorney before another grand jury that in my opinion you are legally obligated to answer proper questions that relate to the nature of

this investigation by virtue of the fact that you waived immunity as required of public officers by the constitution of the State of New York and the City Charter. I explained that to you; am I correct? A. I refuse to answer on the grounds of—same answer.

Q. Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you? A. I refuse to answer on the grounds of State and Federal constitution.

Q. I want to show you this waiver of immunity, Grand Jury Exhibit #16, entitled People of the State of New York against John Doe, et al., waiver of immunity, "I, Lieutenant James T. Stevens," is this the waiver of immunity you signed? A. I refuse to answer on the grounds—State and Federal constitution.

Mr. Scotti: Mr. Foreman, it now becomes my duty to appear before the court and make an application on behalf of this grand jury for a direction from the court to this witness.

(Mr. Scotti, Mr. Andreoli, the Foreman, the witness, and the stenographers leave the grand jury room.)

And the Court, on the said day, after hearing argument by counsel for the said James T. Stevens, and the

District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following proceeding took place in Part 30 of the Supreme Court of the County of New York on July 22, 1964:

* * * * *

The Court: Mr. Stevens, I am directing the Court Reporter to read to you the question that was submitted to you and about which you were interrogated by Mr. Scotti before the First June 1964 Grand Jury, which Grand Jury I understand granted you immunity, and I understand that you signed a limited——

Mr. Scotti: No—before which he executed a waiver of immunity.

The Court: I say he executed a limited waiver of immunity, and under the circumstances I direct the Reporter to read the question to you. Go ahead.

Grand Jury Reporter:

"*Question by Mr. Scotti*:

"Question: Now I am going to ask you point-blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operations in order to permit these bookmakers and

policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?

"Answer: I refuse to answer on the grounds stated in the State and Federal Constitution."

The Court: Now, Mr. Stevens, having heard the question read to you by the Court Reporter, that is my question to you, and I direct you to answer it. What is your answer?

Mr. Stevens: I stand on my Constitutional rights, your Honor.

The Court: All right. Under the circumstances of your refusal to answer, the Court finds you guilty of criminal contempt of this Court and will pronounce sentence upon you Friday——

Mr. Molony: I would like a week.

The Court: Is there any objection to Tuesday?

Mr. Scotti: Tuesday I have no objection.

The Court: Tuesday, July 28, 1964. And you are to appear in this Court at 11:00 A.M. on July 28th for that purpose.

Mr. Scotti: May I respectfully suggest to the Court that the record show that this witness has refused to comply with the direction? He merely said, "I stand on my Constitutional rights" and has not indicated——

The Court: That is a refusal. Do you refuse to answer the question?

Mr. Stevens: I do, sir, on my Constitutional rights.

The Court: Now, in the interval, counsel—Mr. Molony, is it?

Mr. Molony: Molony.

The Court: If you have any memorandum to submit to me before Tuesday, I will be glad to receive it; and send it to my chambers.

Mr. Molony: Yes, your Honor. May we have argument on Tuesday at 11:00 or just submit a memorandum?

The Court: Well, you come down Tuesday; and after I see the memorandum, perhaps it may need argument. All right.

Mr. Molony: Thank you, your Honor.

Mr. Scotti: Thank you, your Honor.

The court then permitted counsel for James T. Stevens to submit a memorandum of law on July 28, 1964 and heard reargument by Counsel and the District Attorney.

The witness James T. Stevens having on July 22, 1964 contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be directed to pay a fine of $250 and be committed to the custody of the Sheriff of City of New York at Civil Jail, 434 W. 37 St., City, County and State of New York for a term of 30 days, the execution of said order to be stayed for five days from the service of the mandate to permit the witness to apply to the appellate division for a stay.

CHARLES MARKS
J. S. C.

Opinion of Appellate Division, First Department

22 App. Div. 2d 683

(253 N. Y. S. 2d 401)

Before:

BRIETEL, J. P., VALENTE, STEVENS, EAGER and BASTOW

Matter of Stevens, pet. (Marks, vs.)—Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of New York, first appeared before the grand jury of New York County which was investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In Regan v. New York (349 U. S. 58), it was clearly held that one circumstanced as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to re-

fuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that Regan v. New York is controlling here, we do not reach the question as to the effect of Mallory v. Hogan, 378 U. S. 1 and Escobedo v. Illinois, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

Opinion of United States District Court for the Southern District of New York

WEINFELD, District Judge.

The petitioner, until recently a lieutenant with the New York City Police Department, is in custody upon a third state court judgment of conviction for contempt,[1] arising out of his refusal to answer a question put to him by a grand jury investigating alleged police corruption. He seeks his release by Federal writ of habeas corpus on the ground that his rights under the Fifth and Sixth Amendments were violated when, given the choice under New York law either of executing a limited waiver of immunity or losing his job,[2] he signed the waiver. He did not then have the benefit of counsel. Having previously been twice convicted for failing to answer the same question, he also advances a further contention that his present imprisonment constitutes double jeopardy.

On June 25, 1964, petitioner was served with a subpoena commanding his appearance before a June grand jury of

[1] To prevent expiration of petitioner's sentence pending decision, this Court issued a writ pursuant to which he was brought into Federal custody and, in the absence of opposition from respondent, released on his own recognizance. See Johnston v. Marsh, 227 F. 2d 528, 530 n. 4 (3d Cir. 1955).

[2] N. Y. Const. art. 1, §6 provides, in part: "No person * * * shall be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office * * *." A similar provision is contained in N. Y. C. Charter §1123.

the Supreme Court, New York County. Before entering the jury room, he was advised by an assistant district attorney that, pursuant to state law, unless he signed a waiver of immunity he would forfeit his job. He signed the waiver, whereupon he was brought before the grand jury, informed that he was a potential defendant and advised of his right against self incrimination and of state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity. He then acknowledged he had executed the waiver and understood its effect. Petitioner was sworn, asked his name and similar preliminary questions, and then given a financial questionnaire to complete and return. His next appearance was before a July grand jury, when, represented by counsel, he declined to sign another waiver and asked to withdraw the earlier waiver on the ground that he had not had time to confer with counsel prior to its execution. The following day he was discharged from the Police Department because of his refusal to sign a new waiver before the July grand jury. He was then summoned to reappear before the June grand jury (the one before which he had signed a waiver) and refused to answer any questions, including one with respect to alleged payments from bookmakers and policy operators. Upon reiteration of his refusal to answer before a Justice of the State Supreme Court, he was adjudged in contempt, sentenced to serve thirty days, and fined $250. Pending an appeal to the Appellate Division, he sought a stay of the sentence, which was denied.[3] When the Appellate Division affirmed his conviction[4] and leave to appeal to the

[3] Following this denial he applied for a writ of habeas corpus in this Court, which Judge Herlands denied for failure to exhaust available state remedies, which disposition was affirmed by our Court of Appeals.

[4] Stevens v. Marks, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1st Dep't 1964).

Court of Appeals had been denied, he had already served his sentence and paid the fine.

Upon expiration of his first contempt conviction, on September 28, 1964 he was again called before the June Grand jury and again refused to answer the question asked of him in July, whereupon he was held in contempt and sentenced to another term of thirty days and fined $250.[5] His third refusal to answer the question before the June grand jury resulted, on January 15, 1965, in his third summary conviction and imposition of a similar sentence.

[1, 2] It is the State's contention that section 2254 of Title 28, United States Code, requires dismissal of this application on the ground that petitioner has failed, with respect to this third conviction, to exhaust presently available state remedies by an Article 78 proceeding, although it recognizes that his unsuccessful state court test of the first conviction raised the same self-incrimination and right to counsel questions here pressed. This Court is of the view that the exhaustion doctrine does not require petitioner to go through the formality of a futile, time-consuming appeal each time he is adjudged in contempt for failure to answer the same question. Indeed, section 2254 expressly excuses resort to the state courts where, as here, there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." To require repeated and fruitless applications for state court relief would not only confine him to a revolving door process leading nowhere, but "invite the reproach that it

[5] Prior to surrender on this second conviction, petitioner sought to remove the proceeding to the Federal court for this district, pursuant to 28 U. S. C. §1443. Judge MacMahon dismissed the petition on October 20, 1964.

is the prisoner rather than the state remedy that is being exhausted." [6]

The State, however, is on firmer ground in advancing the exhaustion doctrine with respect to the petitioner's claim of double jeopardy. It was never presented to the state courts for consideration, presumably in light of a just decided New York Court of Appeals decision rejecting a similar argument.[7] It was first raised in the petition for the instant writ, but was neither briefed nor argued. In view of the Court's basis for its disposition of this proceeding, it is unnecessary to consider whether the recent state rulings, which seemingly are dispositive of petitioner's double jeopardy plea, relieve him of applying first to the state court before applying to this Court for relief on that ground.

[3, 4] A more basic question is presented, although the State does not raise it, by the circumstance that the petitioner still has ample time within which to challenge his first conviction in the United States Supreme Court. The New York Court of Appeals denied leave to appeal on February 4, 1965; thus petitioner has through May 5 to move for direct review,[8] but he has taken no such step. Fay v. Noia [9] overruled Darr v. Burford [10] to the extent

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[6] United States ex rel. Kling v. La Vallee, 306 F. 2d 199, 203 (2d Cir. 1962) (concurring opinion).

[7] Matter of Ushkowitz v. Helfand, 15 N. Y. 2d 713, 256 N. Y. S. 2d 339, 204 N. E. 2d 498 (1965), relying on Second Add. Grand Jury v. Cirillo, 12 N. Y. 2d 206, 237 N. Y. S. 2d 709, 188 N. E. 2d 138, 94 A. L. R. 2d 1241 (1963). Compare Yates v. United States, 355 U. S. 66, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957); People v. Riela, 7 N. Y. S. 2d 571, 200 N. Y. S. 2d 43, 166 N. E. 2d 840, appeal dismissed and cert. denied, 364 U. S. 474, 915, 81 S. Ct. 242, 5 L. Ed. 2d 221 (1960).

[8] U. S. Sup. Ct. R. 11(1); 28 U. S. C. A. §2101(c).

[9] 372 U. S. 391, 435, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

[10] 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761 (1960).

that it conditioned Federal habeas corpus relief upon a prior certiorari application to the Supreme Court. But whether a prisoner may now proceed directly in a Federal district court to collaterally attack his state court conviction when a remedy is still available in the Supreme Court, and further, whether in an appropriate case the district courts have discretion to require pursuit of such available Supreme Court review,[11] is less clear.[12] Consistent with the Supreme Court's view that the "needs of comity" are adequately served by the exhaustion of state remedies and by the availability to the states of eventual review in the Supreme Court of Federal habeas corpus decisions,[13] and that review by certiorari is more meaningful following compilation of a full and complete record by the lower Federal court, this Court concludes that a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him. However, the prisoner does not have an absolute right to bypass the Supreme Court. The district court, just as it has discretion to deny habeas corpus to a prisoner who has bypassed orderly state proce-

[11] See Wade v. Mayo, 334 U. S. 672, 680-681, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948), overruled in Darr v. Burford, 339 U. S. at 208-210, 70 S. Ct. 587, but arguably resurrected in Fay v. Noia, 372 U. S. at 435, 83 S. Ct. 822.

[12] The question is sometimes avoided by the petitioner's waiting ninety days before seeking Federal district court relief. See Appendix, p. 19a, United States ex rel. Carthan v. Sheriff, City of New York, 330 F. 2d 100 (2d Cir. 1964). Imposition of such a ninety-day waiting period however, seems contrary to Fay v. Noia's advocacy of "swift and imperative justice on habeas corpus." 372 U. S. at 435, 83 S. Ct. at 847.

[13] Fay v. Noia, 372 U. S. at 437-438, 83 S. Ct. 822.

dures,[14] also has discretion to require him to exhaust currently available Supreme Court remedies. And the circumstances of this case justify requiring the petitioner here to seek such review.

[5] First, an appropriate amendment by the New York Court of Appeals of its remittitur would enable petitioner to appeal from the contempt conviction as of right on the ground that a state statute was "drawn in question" and upheld over his Federal constitutional objections.[15] Secondly, failing to secure an adequate amendment to the remittitur to permit such an appeal as of right, petitioner would still be in a position to apply for certiorari; and in either event, bail could be granted.[16] Thirdly, unlike most such applications,[17] the petitioner's was prepared by counsel and presents an adequate basis for decision. Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim.

In Regan v. People of State of New York,[18] a New York City policeman was summoned before a grand jury investigating corruption. He, too, executed a waiver of immunity, then sought to repudiate it on the ground that at the time of its execution he was under economic duress

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[14] Id. at 438; 83 S. Ct. 822.

[15] 28 U. S. C. §1257(2). Of course, petitioner must apply for and obtain an amended remittitur indicating consideration and disposition of his Federal contentions. See Ungar v. Sarafite, 376 U. S. 575, 582-583, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

[16] 18 U. S. C. §3144; Hudson v. Parker, 156 U. S. 277, 284-287, 15 S. Ct. 450, 39 L. Ed. 424 (1895).

[17] See Brown v. Allen, 344 U. S. 443, 492-495, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (separate opinion by Frankfurter, J.).

[18] 349 U. S. 58, 75 S. Ct. 585, 99 L. Ed. 883 (1955).

and unclear as to his rights. Regan was convicted of contempt, although by a jury, for refusing to answer questions put to him by the grand jury. The Supreme Court held that, where there was an adequate immunity statute, Regan had no constitutional right to remain silent, and that his contentions with respect to the waiver were premature. Said the Court:[19]

> "The waiver of immunity, although it does affect the possibility of subsequent prosecution, does not alter petitioner's underlying obligation to testify. Much of the argument before this Court has been directed at the question of whether the waiver of immunity was valid or invalid, voluntary or coerced, effectual or ineffectual. That question is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired.
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> * * * * *
>
> "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify."

Petitioner's attempts to distinguish Regan are unpersuasive, the factual differences in the two cases appearing to have no relevance to the ground of decision there. Moreover, the Supreme Court last Term reaffirmed the basic premise underlying Regan: that valid state immunity legislation empowers a state to compel testimony

[19] Id. at 62, 64, 75 S. Ct. at 587, 588.

which would otherwise be self-incriminating.[20] Unless Regan is to be overruled, resolution of petitioner's contentions concerning the validity of the waiver must await an attempt to prosecute him on the basis of compelled testimony,[21] or an adjudication with respect to his employment rights.[22] The District Court should not be called upon to divine whether Regan remains controlling authority. So long as an avenue to the Supreme Court is open, petitioner in these circumstances ought to avail himself of it.

The writ upon which petitioner was brought into Federal custody is dismissed and petitioner, having been released on his own recognizance pending determination of this proceeding, is directed to surrender to the State within five days.

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[20] See Murphy v. Waterfront Comm'n, 378 U. S. 52, 79, 93-100, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964). The relevance of Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) is less clear, since the Regan court seems to have proceeded on the assumption that the self-incrimination clause did apply.

[21] See People v. Guidarelli, 255 N. Y. S. 2d 975 (3d Dep't 1965).

[22] There is currently pending in the State Supreme Court petitioner's Article 78 proceeding to review his discharge. The State's answer contains an offer to restore petitioner to his position with back pay, provided he testifies pursuant to the waiver now under attack.

Opinion of the United States Court of Appeals

FOR THE SECOND CIRCUIT

KAUFMAN, *Circuit Judge*:

The principal issue on this appeal is whether a municipal employee could properly refuse to testify before a state grand jury by merely asserting that he did not voluntarily waive the immunity from prosecution conferred by state law. Although the validity of the waiver executed by the petitioner, James T. Stevens, has yet to be determined, he has thrice been adjudged in criminal contempt for refusing, despite directions from two New York State Supreme Court justices, to answer questions propounded by the grand jury. Claiming that he had exhausted the state remedies available to contest his first contempt conviction, the petitioner applied for a writ of habeas corpus in the United States District Court to challenge the third conviction, which like the first two carries a sentence of thirty days' imprisonment, a $250 fine and in default of the fine an additional 30-day prison term. The District Court denied relief, alluding to a directly relevant Supreme Court holding, *Regan* v. *New York*, 349 U. S. 58 (1955), that any contentions respecting the validity of the waiver of immunity are, under such circumstances, premature and do not alter the underlying obligation to testify. We affirm.

The basic facts are undisputed, although seemingly complicated—as the following recitation will indicate—by petitioner's repeated efforts to test, in both the state and federal courts, his duty to testify. Stevens, a lieutenant in the New York City Police Department, was first served with a subpoena the morning of June 25, 1964, commanding his appearance as a witness before the First June 1964

Grand Jury, which was then investigating alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Outside the grand jury room, Stevens, without counsel at the time, was advised by an assistant district attorney to sign a limited waiver of immunity; otherwise, pursuant to the state constitution and city charter,[1] he would be subject to removal from office. Stevens executed the waiver and went before the grand jury. There he was informed that he was a potential defendant and advised of his privilege against self-incrimination and the state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity or else suffer disqualification from office for five years. Petitioner then acknowledged that he had already executed the waiver of immunity and understood its effect. He answered a few perfunctory questions, identifying himself by name, address, rank and police command, and was dismissed with instructions to return at a later date with a completed financial questionnaire.

On July 15, having been subpoenaed to appear before the Third July 1964 Grand Jury, Stevens—now represented and advised by counsel—declined to sign a new limited waiver of immunity prior to giving any further testimony before this grand jury. At that time he also sought to withdraw the waiver he had previously signed in connection with his appearance before the First June 1964

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[1] The New York State Constitution, art. I, sec. 6, provides in part: "No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office . . ." A similar provision may be found in New York City Charter §1123.

Grand Jury, claiming that he had been denied the right to consult with counsel when it was executed. As a consequence of these actions, Stevens received formal notice, the following day, that his employment as a police lieutenant was terminated.

One week later, on July 22, Stevens was summoned to reappear before the First June 1964 Grand Jury. He quickly informed that body of his discharge from the police department since his appearance on June 25 and his attorney's advice that, notwithstanding the waiver he had previously signed, he had a constitutional privilege not to testify unless immunity from prosecution was expressly conferred. He was then asked the following question which he refused to answer on the aforesaid ground:

> Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York?

Petitioner thereafter was directed by a judge of the State Supreme Court to answer the question and warned of the consequences if he persisted in invoking his purported federal constitutional privilege not to testify. Stevens remained steadfast in his refusal and was adjudged in criminal contempt.

While a review of this contempt citation was pending in the state courts but after expiration of the 30-day prison sentence,[2] Stevens was again subpoenaed on September 28,

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[2] While serving his 30-day sentence, Stevens applied to the United States District Court for a writ of habeas corpus, claiming that his privilege against self-incrimination and right to counsel had been abridged in the state court proceedings. Judge Herlands denied the petition, noting that an Article 78 proceeding in the nature of an appeal, New York Civil Practice Law and Rules §7801, was then pending before the Appellate Division and, therefore, Stevens had not met the general requirement, 28 U. S. C. §2254, that available state remedies be exhausted before invoking federal habeas corpus.

1964, to reappear for the third time before the same First June 1964 Grand Jury. Once more the question regarding receipt of payments from gamblers was posed and again petitioner persevered in his refusal to respond. This contumacious conduct led to a second judgment of criminal contempt, imposed by another judge of the State Supreme Court.[3]

During the period when petitioner was serving his second 30-day contempt sentence, the Appellate Division of the Supreme Court dismissed his petition seeking to annul the first judge's adjudication of contempt. *Stevens* v. *Marks*, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1964). The Court, citing the Supreme Court's decision in *Regan* v. *New York*, *supra*, held that Stevens' challenge to the validity or effectiveness of the waiver of immunity, although available as a defense in any subsequent prosecution which might arise from the grand jury probe, was not a sufficient justification for refusing to testify at this preliminary stage in the proceedings.

After Stevens completed serving the second sentence and while his motion for leave to appeal from the Appel late Division's adverse decision was pending before the New York Court of Appeals, he was subpoenaed, on January 15, 1965, to appear for the fourth time before the First June 1964 Grand Jury. He continued to persist in his refusal to testify, both before that body and in the

[3] Instead of taking advantage of the five days afforded to apply to the Appellate Division of the State Supreme Court for a stay of execution of the second contempt conviction pending appeal, Stevens sought to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443. Judge MacMahon vacated and dismissed the removal petition, indicating that Stevens could not do by indirection what he could not do directly—test the validity of his waiver of immunity in advance. He noted, moreover that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right.

face of the judge's new direction. Accordingly, Stevens was adjudged guilty of criminal contempt for the third time and once more sentenced to 30 days' imprisonment, a $250 fine and in default thereof an additional prison term of 30 days. When the New York Court of Appeals subsequently denied leave to appeal from the judgment dismissing the petition to set aside the first adjudication of contempt,[4] Stevens—who was then in civil prison—filed his present petition for a writ of habeas corpus. Judge Weinfeld denied federal relief, but thereafter issued a certificate of probable cause and released petitioner on his own recognizance pending this expedited appeal.

I.

Initially, we note that by testing his first conviction in the state courts—raising basically the same issues now presented[5]—Stevens satisfied the predicate for federal habeas corpus review of his third conviction. The requirement that presently available state remedies with respect to the third conviction be exhausted does not apply where, as here, "circumstances [render] such process ineffective to protect the rights of the prisoner." 28 U. S. C. §2254. To

[4] An Article 78 proceeding by which Stevens seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal, is currently pending in the state courts. The Corporation Counsel's answer includes an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged.

[5] Stevens does claim, for the first time in this petition, that the third conviction subjects him to double jeopardy. But this contention was neither briefed nor argued here and, more important, never presented to the state courts for consideration. Insofar as the present petition is based on this claim, we hold that it is premature for failure to exhaust presently available state remedies. 28 U. S. C. §2254; *United States ex rel. Tangredi* v. *Wallack*, —— F. 2d —— (2 Cir. April 1, 1965); *United States ex rel. Bagley* v. *LaVallee*, 332 F. 2d 890, 892 (2 Cir. 1964).

require a needless, purely formal application for state court relief each time Stevens is adjudged in contempt for not answering the identical question would, as the District Court noted, "not only confine [petitioner] to a revolving door process leading nowhere, but 'invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.' "

The District Court did, however, in the exercise of its discretion, deny relief because at that time Stevens could still seek Supreme Court review, by direct appeal or certiorari, of the first conviction. It is not necessary for us to pass on the propriety of that ground for decision. On the last day possible Stevens successfully applied to Circuit Justice Harlan for an extension of time in which to file a petition for a writ of certiorari. But since this appeal has not been withdrawn and our resolution of the Constitutional issues might be of some assistance to the Supreme Court, to which these same issues will be presented in the certiorari application on the first conviction, we deem it appropriate to turn to the merits, a procedure dictated by sound considerations of judicial administration and the course of state litigation on the original conviction, which is in no way antithetical to the needs of comity in our delicately balanced federal system.

II.

The basic and crucial attack by Stevens on all the contempt convictions is grounded on his contention that he could not constitutionally be obligated to testify before a grand jury without an express grant of immunity from prosecution. He brushes aside the effect of the limited waiver of immunity, claiming that his privilege against self-incrimination and right to counsel were infringed when, under the compulsion of New York law and without

the benefit of proper legal advice, he executed the waiver in order to save his job.

But these contentions are, if we are to harmonize our holding with *Regan* v. *New York*, *supra*, prematurely advanced and cannot excuse Stevens' contumacious refusal, after repeated judicial directions, to cooperate with the grand jury. The facts of *Regan*—not significantly distinguishable from the instant case—deserve brief mention. Regan, also a member of the New York City Police Department, was summoned before a grand jury investigating the alleged association of municipal policemen with criminals, racketeers, and gamblers. At first, he too executed a waiver of immunity, but later—after his employment with the police department had been severed—reconsidered his original waiver and refused to answer the grand jury questions, claiming that the waiver was obtained by a "pattern of duress and lack of understanding." The Supreme Court upheld his conviction for criminal contempt, noting that the validity *vel non* of the waiver was "irrelevant" because, given a valid state immunity statute, there was no possible justification for not testifying.

That holding—its force unimpaired by intervening decisions—is dispositive of Stevens' claims. Justice Reed's exposition of the decision's rationale is significant: "The invalidity of the waver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify." 349 U. S. at 64. Indeed, if Stevens' waiver is defective because he should have had the advice of counsel before signing the instrument, or his federal constitutional rights were abridged by the state requirement that he sign a waiver to preserve his public office, or if he should have been permitted to withdraw the waiver, even then, as we

view the relevant provisions of the state penal law, immunity from prosecution will automatically follow.[6]

The question before us is, therefore, a narrow one: Should a witness be permitted to test the validity of a waiver of immunity prior to testifying before the grand jury? We hold that the resolution of any challenge to the waiver must abide the state's subsequent prosecution on the basis of the allegedly compelled testimony, if in fact that course is ever taken by the state. Although we recognize that the grand jury witness is thus placed in a quandary because he is not sure of the status of his waiver, this incertitude cannot bar the state from obtaining his testimony. "[T]he Constitution does not require," the Supreme Court has told us, "the definitive resolution of collateral questions as a condition precedent to a valid contempt conviction... The law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action." *Regan* v. *New York*, 349 U. S. at 64.

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[6] The New York Penal Law §381(2) provides: "In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

Section 2447(1) of the Penal Law provides: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein."

Furthermore, we do not regard *Regan* as having been weakened, much less *sub silentio* overruled, by *Malloy* v. *Hogan*, 378 U. S. 1 (1964), which applied the Fifth Amendment's privilege against self-incrimination to the states via the Fourteenth Amendment due process clause. As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings. Moreover, *Malloy's* relevance is limited; if Stevens is eventually prosecuted, he can, relying on that decision, question the validity of his alleged waiver of the privilege against self-incrimination, urging as he does now that he was compelled to testify or forfeit his public employment by an unconstitutional state law. But see *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 558 (1956); *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951); *United States ex rel. Carthan* v. *Sheriff*, 330 F. 2d 100 (2 Cir.), *cert. denied*, 379 U. S. 929 (1964). Chief Justice Warren foresaw the availability of the point upon a subsequent prosecution based upon the allegedly compelled testimony, when he wrote, in his separate concurrence in *Regan*, that "substantial federal questions may arise if the petitioner is again called upon to testify concerning bribery on the police force while he was an officer *and if he is thereafter* denied immunity as to any offenses related to the investigation." (349 U. S. at 65 (emphasis added).) We are not aware that it has ever been held that the privilege conferred by the self-incrimination clause of the Constitution creates an absolute right to remain silent under all circumstances in the face of a valid inquiry into official misconduct; rather, it is a shield which protects a witness from being compelled to give testimony which could be used against him in a criminal proceeding flowing from the grand jury testimony. See *Feldman* v. *United States*, 322 U. S. 487, 499 (1943).

Finally, we note that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964). Because New York's immunity statute is adequate on its face, we do not believe that Stevens had any constitutional right to refuse to testify before the grand jury. His contempt convictions, therefore, were proper.

Affirmed.

New York State Constitution, Article 1, Section 6

§ 6. [Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of

any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

New York City Charter, Section 1123

§ 1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its terri-

torial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former* § 903.)

Waiver of Immunity

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JOHN DOE, et al.

I, Lt. James T. Stevens, residing at 164 Engert Ave. Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomina-

tion, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

JAMES T. STEVENS

Witness:

JEROME P. CRAIG

State of New York
County of New York—ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

JANET D. WINSTON

JANET D. WINSTON,
Notary Public,
State of New York,
No. 03-4309493,
Qualified in Bronx County,
Certificate filed in New York County
Commission Expires March 30, 1965.

Order of Court of Appeals of the State of New York, Denying Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of February A. D. 1965.

Present,
HON. CHARLES S. DESMOND,
Chief Judge, presiding.

1 Mo. No. 56

In the Matter of the Application

of

JAMES T. STEVENS,

Appellant,

AGAINST

THE HONORABLE CHARLES MARKS, Justice of the Supreme Court of the State of New York, County of New York,

Respondent.

To review and annul &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

[SEAL]

RAYMOND J. CANNON
Clerk

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of October, 1964.

Present—Hon. Charles D. Breitel,
Presiding Justice

" Francis L. Valente,
" Harold A. Stevens,
" Samuel W. Eager,
" Earle C. Bastow,
Justices

7909

—o—

In the Matter of the Application

of

James T. Stevens,

Petitioner,

For an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.,

vs.

Honorable Charles Marks, Justice of the Supreme Court of the State of New York,

Respondent.

—o—

The above-named petitioner, James T. Stevens, having presented a petition, verified the 28th day of August, 1964, praying for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 762 of the Judiciary Law, annulling the order of mandate dated July 30, 1964, and remitting the $250. fine paid by petitioner; and for other relief,

And Hon. Frank S. Hogan, District Attorney, New York County having filed and served upon the petitioner on the 5th day of October, 1964, a notice of motion, pursuant to Section 7804(f) of the Civil Practice Law and Rules, to dismiss the petition herein as a matter of law; and said proceeding having duly come on to be heard before this Court on the 6th day of October, 1964.

Now, upon reading and filing the notice of application, dated September 28, 1964, with proof of due service thereof, the petition of James T. Stevens, duly verified the 28th day of August, 1964, and the affidavit of John P. Schofield, duly sworn to the 6th day of October, 1964, all read in support of the petition, and the notice of motion to dismiss the petition dated October 5, 1964, by Hon. Frank S. Hogan, District Attorney, New York County, with proof of due service thereof, and the affidavit of Michael R. Stack, Assistant District Attorney, duly sworn to on the 5th day of October, 1964, all read in opposition to the application of the petitioner and in support of the motion to dismiss the petition; and after hearing Mr. John P. Schofield in support of the petition and in opposition to the motion to dismiss the petition, and Hon. Frank S. Hogan, District Attorney, New York County, in opposition to the application of the petitioner, and in support of the motion to dismiss the petition; and due deliberation having been had thereon; and upon the memorandum decision of the Court filed herein,

It is unanimously ordered that the motion of Hon. Frank S. Hogan, District Attorney, New York County, to dismiss the petition as a matter of law, be and the same hereby is granted and the proceeding be and the same hereby is unanimously dismissed, without costs.

Enter:

VINCENT A. MASSI,
Clerk